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Twenty-sixth session

SUMMARY RECORD OF THE 503rd MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 9 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.1-4)

Consideration of draft Model Law on Procurement (continued)

Article 19 (continued)

1. Mr. PEREZNIETO CASTRO (Mexico) suggested that in subparagraph (1) (c) the word "supply" be replaced by "delivery".

2. Ms. ZIMMERMAN (Canada), noting that subparagraph (1) (c) contained no reference to the place of delivery of the goods, felt that might be a relevant consideration.

3. Mr. AZZIMAN (Morocco) suggested that the chapeau of paragraph (2) be reworded to read: "An invitation to prequalify shall contain the information referred to in subparagraphs (a), (b), (c), (d), (e), (g) and (h) of paragraph (1), as well as the following information".

4. The CHAIRMAN, noting that the various drafting suggestions would be considered by the drafting group, took it that the Commission wished to adopt article 19.

5. It was so decided.

Article 20

6. Mr. SAHAYDACHNY (Secretariat), drawing attention to the Secretariat proposals in document A/CN.9/377 for amending article 20, said that prequalification documents were not likely to be involved when a procuring entity was using a procurement method other than tendering proceedings.

7. Mr. PRIESTLEY (Observer for Australia) said that, if the price charged by the procuring entity was intended to enable it to recover its costs, perhaps the word "producing" would be better than "printing" in the last sentence.

8. The CHAIRMAN, referring to the commentary on article 20 in document A/CN.9/375, said he took it that the Commission wished to adopt article 20.

9. It was so decided.

Article 21

10. Mr. GRIFFITH (Observer for Australia) noted that in the chapeau of article 21, the words "at a minimum" were used, whereas in the chapeau of article 19 the corresponding expression was "at least". For the sake of consistency, the same wording should be used in both articles.

11. The CHAIRMAN said the drafting group would ensure consistency, the words "at a minimum" being used throughout the text.

12. Mr. WALLACE (United States of America) felt that the Secretariat's proposal (in document A/CN.9/377) that the word "principal" be inserted before "terms and conditions of the procurement contract" in paragraph (f) was unwise.

13. As to paragraph (g), he suggested that the words "evaluated and compared" in the additional phrase which the Secretariat was proposing might be replaced by "handled".

14. Mr. LEVY (Canada) agreed with both the points made by the United States representative.

15. Mr. GRIFFITH (Observer for Australia) thought the proposal to add the word "principal" was a reasonable one; it would often be impossible to spell out all the terms and conditions of the contract. If "principal" was added, paragraph (f) should end at the words "the procuring entity".

16. Mr. PHUA (Singapore) wondered whether it would be enough if only the "principal" terms and conditions of the contract were provided in the solicitation documents.

17. Mr. PEREZNIETO CASTRO (Mexico) said he was not in favour of the amendments proposed by the Secretariat.

18. In the Spanish version of paragraph (f), the word escritura should be replaced by a word such as forma or texto.

19. The CHAIRMAN, suggesting that the point regarding the Spanish text be referred to the drafting group, took it that the Commission wished to adopt paragraph (f) without the proposed addition of "principal" and to adopt paragraph (g) with the additional phrase proposed by the Secretariat in document A/CN.9/377, subject to review by the drafting group.

20. It was so decided.

21. Mr. AZZIMAN (Morocco), commenting on the reference in paragraph (n) to "a statement whether the procuring entity intends to convene a meeting of suppliers and contractors", said that normally it would not be known in advance whether such a meeting would be required.

22. The provision in paragraph (s) that the omission of one of the envisaged references should not constitute grounds for review or give rise to liability on the part of the procuring entity was the only provision of its kind in the Model Law. It would therefore be better placed at the end of article 21.

23. Mr. SAHAYDACHNY (Secretariat) said, with regard to the point made by the representative of Morocco about paragraph (n), that, if the procuring entity did not know whether it intended to convene a meeting of suppliers and contractors, the envisaged statement could obviously not be included in the solicitation document. The non-inclusion of such a statement, however, would not preclude the procuring entity from deciding to convene a meeting.

24. Mr. JAMES (United Kingdom) said that, as liability was a separate issue, paragraph (s) should perhaps be separated from the rest of the article.

25. The CHAIRMAN suggested that the Commission adopt article 21 with paragraph (s) moved to the end.

26. It was so decided.

Article 22

27. Mr. SAHAYDACHNY (Secretariat), referring to the Secretariat proposal in document A/CN.9/377 that article 22 be moved to chapter I, said that in the Secretariat's opinion that would help to ensure the widest possible competition.

28. The CHAIRMAN suggested that the question of moving article 22 to chapter I be considered before the actual content of the article.

29. Mr. LEVY (Canada) said that, although the Secretariat proposal was an interesting one, he was not sure how article 22 would apply to requests for proposals or competitive negotiation - or to any other procurement method which the procuring entity might employ because it was unable to specify exactly what it wanted.

30. Mr. JAMES (United Kingdom) said that article 22 was unlikely to be helpful in the context of requests for proposals or competitive negotiation, but in the context of procurement methods such as requests for quotations (or even single-source procurement) it might be of some use, although the cases in question might count for only about 1 per cent of the total. If the article was to be moved, the wording would have to be made more neutral, so that it applied to - for example - requests for quotations.

31. Ms. ZIMMERMAN (Canada) agreed that the wording of article 22 would have to become more neutral if the article was moved to chapter I.

32. Mr. WALLACE (United States of America), expressing himself in favour of the Secretariat proposal, said that article 22 should be redrafted so as to make the underlying principles stand out more clearly.

33. Mr. LEVY (Canada) said that, if article 22 was to be redrafted in such a way that it covered procurement methods such as requests for proposals and competitive negotiation, he would have to withhold his approval until he had seen the text produced by the drafting group. The envisaged relocation would be acceptable only if no damage was done to chapter I.

34. Mr. WALLACE (United States of America) felt that the issue was basically one of drafting; if moved, article 22 would have to be made more flexible.

35. Mr. MORAN BOVIO (Spain) said that, before transmitting article 22 to the drafting group, the Commission should be fully agreed on its substance.

36. Mr. GRUSSMANN (Austria) said that, if article 22 was moved to chapter I, reference to it should be in chapter IV where appropriate.

37. Mr. WALLACE (United States of America) suggested that the article start with the chapeau "To the extent and where applicable".

38. The CHAIRMAN took it that the Commission wished article 22 to be moved to chapter I and that it wished the drafting group to examine the wording of the article in the light of its discussion.

39. It was so decided.

40. The CHAIRMAN, inviting comments on the substance of article 22, drew attention to the Secretariat proposal that the words "Standardized trade terms shall be used" be replaced by the words "Due regard shall be had for the use of standardized trade terms" in subparagraph (3) (b).

41. Mr. JAMES (United Kingdom), expressing support for the proposed amendment, said that in his view a similar amendment would have been appropriate in subparagraph (3) (a). However, his concern had been met by the United States representative's proposal for a chapeau.

42. The CHAIRMAN took it that the Commission wished to adopt article 22 as amended.

43. It was so decided.

Article 23

44. Ms. PIAGGI-VANOSSI (Argentina) suggested that provisions like those in article 23 also be formulated in respect of the envisaged contract, which suppliers and contractors should be able to challenge before its conclusion.

45. Mr. MORAN BOVIO (Spain) said that, in his view, the proposal made by the representative of Argentina related to matters that went beyond what the Model Law was intended to achieve.

46. Mr. WALLACE (United States of America), expressing agreement with the representative of Spain, said he understood the representative of Argentina to have been referring to a situation where the contract was defective. A procuring entity that drafted defective contracts was bad at its job, but that was a political problem that could not be solved through the Model Law. In paragraphs 9 and 10 of the Introduction to the Guide to Enactment (document A/CN.9/375), the Model Law was described as a "framework" law, in which the answers to certain legal questions might not necessarily be found; it was stated there that answers were more likely to be found in other bodies of law, such as the applicable administrative, contract, criminal and judicial procedure law.

47. Ms. PIAGGI-VANOSSI (Argentina) said that, in her view, if the contract contained a serious error or omission, it ought to be possible to rectify the matter, all tenderers being informed of what was being done. That having been said, however, she would withdraw her proposal if the Commission considered it inappropriate.

48. Mr. WALLACE (United States of America), referring to the possibility of redress under the terms of article 38 (1), said that anything more would go beyond the scope of procurement law.

49. The CHAIRMAN said that the point raised by the representative of Argentina could be addressed during the discussion of chapter V - Review.

50. Ms. PIAGGI-VANOSSI (Argentina) said she was not referring to possible redress, but to preventive measures before the procurement contract was concluded. In her view, article 23 should refer to the contract as well as to solicitation documents.

51. Mr. SAHAYDACHNY (Secretariat) said that, in the understanding of the Secretariat, clarification or modification of the contract at an early stage of the procurement proceedings was provided for by article 21 (f) taken in conjunction with article 23; the contract was one of the solicitation documents, with the result that it was subject to the envisaged clarification or modification procedure.

52. Ms. PIAGGI-VANOSSI (Argentina) said that clarification or modification of the contract in the manner envisaged would be possible only if the terms and conditions of the contract were known at an early stage.

53. The CHAIRMAN took it that the Commission wished to adopt article 23.

54. It was so decided.

Article 24

55. Article 24 was adopted.

Article 25

56. Mr. PRIESTLEY (Observer for Australia) suggested that a location for the submission of tenders should be specified in paragraph (1).

57. Mr. LEVY (Canada), supporting that suggestion, proposed that the paragraph read "The procuring entity shall fix a specific date and time as the deadline and the location for the submission of tenders."

58. It was so decided.

59. Mr. TUVAYANOND (Thailand), having suggested that "suppliers and contractors" in paragraph (2) should perhaps read "suppliers or contractors", said that he could not understand why a deadline extension should be required following a meeting of suppliers or contractors.

60. Mr. SAHAYDACHNY (Secretariat), having agreed that "suppliers or contractors" would probably be more correct, said that the purpose of the envisaged meeting would be to clarify the solicitation documents, the information provided at the meeting being deemed essential for the preparation of tenders. The Working Group had therefore considered it necessary, when minutes of the meeting were issued, to allow time for them to be taken into account.

61. Mr. TUVAYANOND (Thailand) asked who would organize such meetings.

62. Mr. SAHAYDACHNY (Secretariat) drew attention to article 23 (3), which suggested that the procuring entity was responsible for convening such meetings and for preparing the minutes.

63. Mr. AL-NASSER (Saudi Arabia) asked whether an indication could not be given of the period by which the deadline for the submission of tenders might be extended.

64. Mr. SAHAYDACHNY (Secretariat) replied that the Working Group had felt that it would be inappropriate for the Model Law to establish deadlines for the submission of tenders; so it would also be inappropriate for the Model Law to indicate how far such deadlines might be extended. Such matters were best left to the enacting State and its procurement regulations.

65. The CHAIRMAN said he took it that the Commission wished to adopt paragraph (2) with the words "suppliers and contractors" amended to "suppliers or contractors" [where they first occurred] [at both places where they occurred].

66. It was so decided.

67. Mr. TUVAYANOND (Thailand) felt that in paragraph (3) it was going too far to provide for a deadline extension "due to any circumstance" beyond the control of suppliers or contractors.

68. The CHAIRMAN said that, as indicated in the draft Guide to Enactment (document A/CN.9/375), paragraph (3) was permissive.

69. Mr. AL-NASSER (Saudi Arabia) suggested that if, following a deadline extension, the number of suppliers or contractors submitting tenders was considerably lower than the number invited to do so, it should be possible for the deadline to be extended further.

70. Mr. PHUA (Singapore) asked whether, if the procuring entity decided to exercise its discretion and not extend the deadline, its decision would be open to judicial review.

71. Mr. LEVY (Canada) said that, although the word "may" was generally regarded as permissive, it was not impossible under common law that a procuring entity relying on the wording of paragraph (3) as it stood would find itself subject to judicial review on grounds that the provision in question was mandatory. The wording should therefore be tightened up, perhaps through insertion of the words "at its sole discretion" after "may".

72. Mr. WALLACE (United States of America) suggested a form of words such as "The procuring entity may, at its discretion and if, in its judgment, it believes that its convenience is served ...".

73. Mr. PHUA (Singapore) wondered whether the procuring entity could not be protected through a suitable addition to article 38 (2).

74. Mr. TUVAYANOND (Thailand) supported the proposal made by the representative of Canada.

(Mr. Tuvayanond, Thailand)

75. In response to the question asked by the representative of Singapore, he said that judicial review was foreseen for cases such as breach of duty and bad faith on the part of the procuring entity. Use of the word "may" in paragraph (3) suggested that a supplier or contractor would not be able to challenge the decision of a procuring entity not to extend the deadline.

76. Mr. JAMES (United Kingdom) said that chapter V - Review - dealt with failure on the part of the procuring entity to comply with duties. As he recollected, however, the Working Group had intended "may" in paragraph (3) of article 25 to be discretionary. Nevertheless, he had no objection to the proposal made by the representative of Canada.

77. With regard to the words "in its judgement" suggested by the representative of the United States of America, he felt that they might make the kind of judicial review found in the United Kingdom and in most other common law jurisdictions more likely - on the grounds of unreasonable exercise of judgement.

78. Mr. PRIESTLEY (Observer for Australia) supported the proposal made by the Canadian representative but suggested replacement of the word "sole" by "absolute"; in most common law jurisdictions the expression "absolute discretion" went as far as was possible in trying to exclude judicial review.

79. The CHAIRMAN asked whether the Commission could accept the text of paragraph (3) with the insertion of the words "at its absolute discretion" before "may".

80. It was so decided.

81. The CHAIRMAN asked the Commission whether it could accept paragraph (4) as drafted.

82. It was so decided.

83. The CHAIRMAN recalled that, at its 501st meeting, the Commission had tentatively agreed that the first sentence of paragraph (5) should read "A tender shall be submitted either in writing in a single sealed envelope or by any other means stipulated by the procuring entity which provides at least a similar degree of authenticity, security and confidentiality". Also, he drew attention to the Secretariat proposal contained in document A/CN.9/377.

84. Mr. AL-NASSER (Saudi Arabia) suggested the addition of a phrase on the lines of ", including an envelope issued directly by a computer," after "single sealed envelope".

85. Mr. JAMES (United Kingdom), supporting the Secretariat proposal, said it was necessary to ensure the highest degree of authentication of tenders. There was therefore a strong case for requiring that a tender be signed by a director or other officer of the company submitting it.

86. Ms. ZIMMERMAN (Canada) said that, although her delegation would not object to the addition of a requirement that tenders must be signed or authenticated in some other manner, it would have difficulty if the authentication procedure was spelled out in the kind of detail appropriate in corporate law.

87. Mr. ANDERSEN (Denmark) said that, in his view, the real issue was whether an offer was binding on the party submitting it; that would depend on the legal system in question. The Model Law should simply make it clear that, in order to be accepted by the procuring entity, the offer must be binding, and there should be no attempt to specify what made an offer binding.

88. Mr. HAINZL (Austria), endorsing the statement made by the representative of Denmark, said that the point at issue was one best dealt with in the relevant civil laws of enacting States rather than in the Model Law.

89. Mr. TUVAYANOND (Thailand) wondered whether fax communication was regarded as a form of electronic data interchange (EDI). If it was, problems might arise in his country, where the courts had ruled that a fax did not constitute proof as it could easily be falsified.

90. He also wondered whether suppliers or contractors submitting tenders in electronic form might not be subject to less stringent document legalization requirements than those submitting written tenders.

91. Mr. WALLACE (United States of America) said that in most cases the procuring entity required that tenders be signed. Paragraph (5) should therefore provide for the signing of tenders.

92. Mr. ANDERSEN (Denmark) said that, in his view, it was unreasonable to insist that the person responsible for the submission of a tender should actually sign the tender when there was no doubt that that person was bound by it; in such a case, the signature requirement was a very formalistic one.

93. Mr. PEREZNIETO CASTRO (Mexico) expressed support for the views expressed by the representatives of Denmark and Austria.

94. Mr. AL-NASSER (Saudi Arabia) said that in his country there was a trend towards the acceptance of computer-generated signatures.

95. The CHAIRMAN asked the Commission whether it could accept - subject to editing by the drafting group - the following wording for the first sentence of paragraph (5): "A tender shall be submitted, signed, either in writing in a single sealed envelope or by any other means [stipulated by the procuring entity] which provides at least a similar degree of authenticity, security and confidentiality."

96. It was so decided.

97. The CHAIRMAN asked the Commission whether it could accept paragraph (6) as drafted.

98. It was so decided.

The meeting rose at 5.05 p.m.